

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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77-1438

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-1438

UNITED STATES OF AMERICA,

Appellee,

v.

RUSSELL BUFALINO,
MICHAEL SPARBER and
HERBERT JACOBS,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

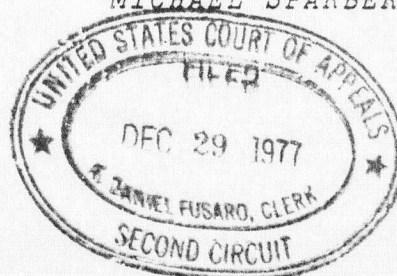
BRIEF FOR DEFENDANT-APPELLANT MICHAEL SPARBER

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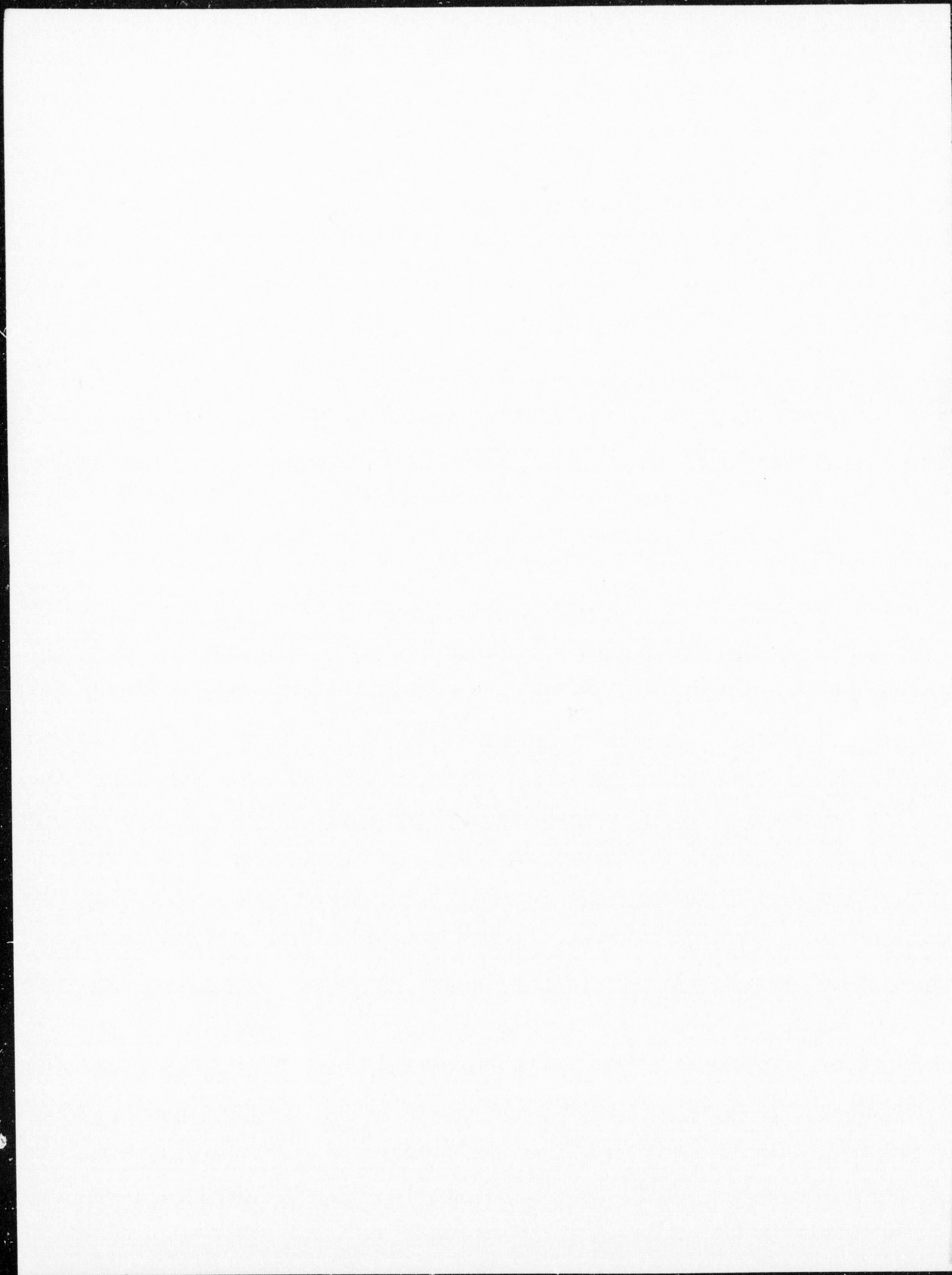


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UNITED STATES OF AMERICA, :
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v. : Docket No. 77-1438
RUSSELL BUFALINO, :
MICHAEL SPARBER and :
HERBERT JACOBS, :
Defendants-Appellants. :
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BRIEF FOR DEFENDANT-APPELLANT MICHAEL SPARBER

Defendant-Appellant Michael Sparber submits this brief in support of his appeal from a judgment of conviction entered on October 21, 1977 in the United States District Court for the Southern District of New York after a seven-day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Sparber filed his Notice of Appeal on October 31, 1977. Defendants-Appellants Russell Bufalino and Herbert Jacobs have also filed Notices of Appeal.

I. PRELIMINARY STATEMENT

Indictment 76 Cr. 982 was filed on October 26, 1976, in two counts. Count I charges that, beginning in February 1976, defendants Russell Bufalino, Michael Sparber, Herbert Jacobs and Joseph Lapadura conspired to use extortionate means to collect and attempt to collect "extensions of credit" from Jack Napoli, in violation of Title 18, United States Code, Section 894.* Count II charges the four defendants with the use of extortionate means to collect and attempt to collect "extensions of credit" from Napoli in violation of Title 18, United States Code, Sections 894 and 2.

On December 8, 1976 Sparber moved for a Bill of Particulars and for discovery of materials believed to be in the possession or control of the Government [36(b)].** This included a motion, brought pursuant to Rules 12 and 16,

* More particularly, Count I charges that the four defendants conspired to threaten harm to the person, reputation and property of Jack Napoli in order to collect \$25,000 -- stated to be owed to Jacobs as the result of "sales" of certain jewels "on credit". As elaborated in Sections III(B) and IV(C), infra, we submit that the indictment should have been dismissed when it became established that, rather than attempting to collect "extensions of credit", Sparber and others attempted to obtain the return of jewels Napoli swindled from Jacobs and sought money restitution for those misappropriated jewels only after learning that Napoli had lied about the whereabouts of the jewels and could not return them.

** Numbers, such as "36(b)", will be used to refer to specific documents -- in this case Sparber's December 8, 1976 Notice of Motion, Motion for Discovery, and Supporting Affidavit of Counsel -- as listed in the Index To The Record On Appeal. All such Sparber motions were prepared and submitted by counsel appointed by Judge Lasker to represent Sparber. That appointment has been continued for purposes of the present appeal.

The trial transcript will be referred to as "Tr."

F.R.Crim.P., that the Court order the Government to identify all recordings and transcripts made as the result of any electronic surveillance, to specify the chain of custody of each such recording, and to make the recordings and transcripts available for inspection. In response, the Government stated that several telephone conversations and three meetings between Jack Napoli and one or more of the defendants had been recorded. The Government informed Judge Lasker and defense counsel that the meetings had been recorded on April 12, 16, and 20, 1976 -- by means of both a Kel transmitter and a Nagra body recorder -- and that the "original tape recordings are in the custody of the F.B.I." and duplicates and originals could be made available for defense counsel to listen to [3, pp. 1-3 & 7].

We listened to the three Nagra body recordings (and, later, duplicates of those recordings filtered by the F.B.I. in an effort to improve audibility), and found that there were several gaps or pauses in the tapes and many portions were inaudible [36(i), Affid. ¶6].*

During this same period of time we learned that Napoli had a notoriously bad reputation (as a forger, confidence man and swindler) [e.g., 36(b), Affid. ¶8], and that at least one of the three Nagra recordings had not been delivered to the F.B.I. until several hours after that recording had been made by Napoli [3, pp. 1-2].

* We also listened to recordings of the telephone conversations, but did not question audibility.

We raised these problems at a pretrial conference held on January 31, 1977, and asked to listen to the recordings of the April 12, 16, and 20 Kel transmissions in an effort to obtain complete recordings of the conversations and determine if Napoli or others had altered the Nagra recordings. The Government then informed Judge Lasker and defense counsel for the first time that the Government no longer had those Kel recordings -- because they had been destroyed by the F.B.I. [36(i), Affid. ¶6]. As a result, we requested a formal audibility hearing with respect to the Nagra recordings and moved to suppress evidence. The request for the audibility hearing was granted, on the Government's consent, and a suppression hearing was ordered, over the Government's opposition [36(f), p.2].*

The audibility hearing was held on April 23, 1977. After listening to portions of the tapes, and the arguments of counsel, Judge Lasker ruled that: the portions of the April 12 recordings relied on by the Government were sufficiently audible to be received in evidence and the gaps in those portions did not prevent what could be heard from "appearing to make sense" [12, 4/23/77 Tr. 22-23]; the portions of the April 20 recording relied on by the Government included inaudible stretches in the middle of several

* When the Government opposed a suppression hearing we brought to the Court's attention [12, 4/23/77 Tr. 58-61] that a hearing as to the destruction of the Kel tapes was virtually mandated by Killian v. United States, 368 U.S. 231 (1961) and Campbell v. United States, 365 U.S. 85 (1961).

statements but these inaudible stretches did not "render the tape unusable or ...distorted" [12, 4/23/77 Tr. 31-32]; and several portions of the April 16 recording relied on by the Government were inadmissible, because inaudible [12, 4/23/77, Tr. 40-41, 44, 47-48, 54-56].*

The suppression hearing was held on May 5 and 9, 1977. That hearing established that, on the eve of the grand jury presentations which lead to the indictment now on appeal, and at a time when he realized that Napoli would likely be called by the Government as a trial witness in the event of an indictment, the F.B.I. Agent in charge of the case deliberately destroyed the April 12, 16 and 20 Kel tapes [39, Tr.85, 109-11, 118]** It is not disputed that the destroyed Kel tapes were all sufficiently audible to constitute Jencks Act statements of Napoli and Rule 16(a) statements of one or more of the defendants [25, pp. 9-10].

* The gaps and inaudible portions of these three Nagra recordings are also evidenced by the transcripts [41, GX 1-A, 4-A & 6-A, id.] given to the jury when those recordings were played for the jury; virtually every page of those transcripts indicate several "unintelligible" portions, and many pages indicate "pauses".

** As elaborated in Section IV(A), *infra*, this Court has distinguished such deliberate destruction when declining to reverse a conviction because of the "inadvertent" loss of a Kel-transmitted recording, United States v. Miranda, 526 F.2d 1319, 1328 (2 Cir. 1975), and at least three Circuit Courts of Appeals have held that the deliberate destruction of Jencks Act statements mandated relief. United States v. Carrasco, 537 F.2d 372 (9 Cir. 1976); Lee v. United States, 368 F.2d 834 (D.C.Cir. 1966); and United States v. Lonardo, 350 F.2d 523 (6 Cir. 1965).

Stephen Edwards, the Special Agent of the Federal Bureau of Investigation who had been assigned as the "Case Agent" in charge of the investigation and preparation of evidence for the prosecution of this case, testified at the suppression hearing on May 9, 1977 [39]. Agent Edwards testified to the manner in which he equipped Napoli with a Nagra tape recorder and a Kel transmitter on April 12, 16 and 20, 1976 to record conversations with the potential defendants for evidentiary purposes [39, Tr. 71-73, 104].

Wearing these devices, Napoli engaged the defendants in conversations in and near a small Manhattan restaurant named Vesuvio's [39, Tr. 76-77]. These conversations were transmitted by the Kel transmitter to several F.B.I. agents at various receiving locations in and near Vesuvio's; the Kel transmissions were sufficiently audible for Agent Edwards to testify that, while outside the restaurant, he heard transmissions of Napoli "being threatened" on April 12 and 16 [39, Tr. 101-04].

These Kel transmissions were recorded, "so that they would be available to be used in evidence" [39, Tr. 104].* The April 12 Kel recording was made using a Sony cassette

* Agent Edwards characterized the Kel recordings as of potential evidentiary value only as a back-up system, in the event that the Nagra malfunctioned [39, Tr. 104]. But Agent Edwards admitted that, as of the time he deliberately destroyed the several Kel tapes in this case, he knew that Kel-transmitted recordings had been introduced in evidence during criminal proceedings and Judge Lasker took judicial notice of the fact that Kel recordings had been used as evidence in a number of trials before him [39, Tr. 86]. Furthermore, at the time he destroyed the Kels, Agent Edwards knew of the gaps and inaudible portions in the Nagras (see p. 8, infra).

recorder [39, Tr. 76] located in a truck parked approximately 100 to 200 feet from the restaurant [39, Tr. 100]. Agent Edwards testified that the truck remained stationary throughout the time the April 12 Kel transmission was recorded, and admitted that the practice was to move such a vehicle if the transmission was not being received in an audible form [39, Tr. 100-01].

Two recordings were made of the April 16 and 20 Kel transmissions, one by Agent Edwards in a nearby car using a Sony cassette recorder and one by an agent inside the small restaurant using an SK8 suitcase recorder [39, Tr. 77-78]. Agent Edwards conceded that the F.B.I. routinely relies upon both such recorders to make accurate recordings [39, Tr. 111].

The April 12, 16, and 20 meetings were also recorded by the Nagra recorder worn by Napoli. However, unlike the Kel tapes (which were continuously in the custody of the F.B.I. until destroyed), the Nagra tapes were in the unsupervised possession of the notoriously untrustworthy Napoli (and at least one other, unknown, person) for periods up to several hours. As Agent Edwards described it, Napoli was "on his own to a certain extent" between the time Napoli made the recordings and the time the F.B.I. received those recordings [39, Tr. 94-96]. In fact, the Nagra tape of April 12 "was in the custody of Napoli or some [un]identified female and not in the custody of the F.B.I. for at least several hours between the time of the conversation and the

time the F.B.I. got the tape" and, the Nagra tapes of April 16 and 20 were in the unsupervised possession of Napoli for up to an hour after the conversations took place [39, Tr. 95-96, 98-99].

Agent Edwards admitted that substantial passages of the Kel tapes were audible and testified about some of the passages he recalled [39, Tr. 116]. He admitted that he did not attempt to compare the audibility of parallel segments of the Kel and Nagra recordings, and that he was not absolutely certain that the inaudible portions of the Nagra recordings were not audible on the Kel recordings [39, Tr. 149-52]. He also admitted that he lacked the expertise to determine if any of the Nagra tapes had been altered, and that he did not ask any expert to examine the Nagra tapes before he destroyed the Kels [39, Tr. 146-50].

Agent Edwards conceded that his destruction of the Kel tapes was "deliberate" -- not inadvertent [39, Tr. 110]. He also conceded that, when he destroyed the Kel tapes, he was aware of Napoli's reputation as a "notorious con man and swindler" and he was aware of the gaps and inaudible portions in the Nagra recordings [39, Tr. 97, 148-49]. And he ultimately conceded that, at the time he deliberately destroyed the Kel tapes, it was a routine part of his duties to collect Jencks Act statements and make them available to the United States Attorney's office [39, Tr. 110-11].

The Government's objections were sustained (we submit, erroneously) when we attempted to also establish

that, at the time he destroyed the Kel tapes, Agent Edwards was aware that the F.B.I. had been criticized for its deliberate destruction of Jencks Act materials -- later argued to be of no substantial evidentiary value -- and was also aware that criminal convictions had been reversed because of the deliberate destruction of Jencks Act statements [39, Tr. 118-20].*

Apparently in an effort to prove that Agent Edwards' deliberate destruction of the Kel-transmitted recordings was harmless error, the Government also called Paul Ginsberg, an electrical engineer experienced in audio engineering. Ginsberg testified that, in his opinion, a Nagra body recording would always be more audible than a Kel-transmitted recording [38, Tr. 53].

In substantial measure, Ginsberg's opinion was based on his experience that a Kel transmitter has a limited range and can be interfered with by steel beams, etc., if received in an agent's car outside the room in which the Kel is located [38, Tr. 21-23]. He testified that he had heard ten to fifteen cassette recordings of Kel transmissions received in such cars and the audio quality was poor [38, Tr. 22-24]. And he testified that a Nagra recorder was

* We submitted below, and reiterate on appeal, that it is inconceivable that someone of Agent Edwards' substantial experience would not have known of these criticisms and reversals and, without attributing any evil intent to procure an unwarranted conviction, the deliberate destruction of the Kel tapes under these circumstances is the type of reckless disregard of the Jencks Act and Rule 16 that virtually compels the relief we seek.

superior to a Sony cassette recorder [38, Tr. 27]. In response to a hypothetical question by the Government, Ginsberg testified that in his opinion a Nagra recording would always be superior to a Sony cassette recording of a Kel transmission of the same conversation received over a car radio [38, Tr. 32-33]. On this basis the Government contended that it was reasonable for Agent Edwards to destroy the Kel tapes [38, Tr. 37-38].

We did not cross-examine Ginsberg as to the relative audibility of conversations recorded on the tiny Nagra recorder worn on Napoli's person, on the one hand, and Kel-transmitted conversations recorded on the large sophisticated SK8 suitcase recorder used inside Vesuvio's on April 16 and 20, on the other hand. The Government had not told us, as of the time of Ginsberg's May 5 hearing testimony, that an SK8 suitcase recorder had also been used to record the Kel transmissions on those days.* More to the point, the Government did not offer any testimony as to the relative audibility of the small Nagra recorder worn by Napoli and the SK8 suitcase recorder used to record the April 16 and 20 Kel transmissions in Vesuvio's. Indeed, as we understood it, the Governmen' implied at the close of Ginsberg's testimony -- after the Court and defense counsel asked why the Government

* No mention of the SK8 suitcase recorder was made until Agent Edwards testified on May 9, four days after Ginsberg testified. And, whenever asked, Agent Edwards disclaimed any technical expertise as to the equipment used [e.g., 39, Tr. 146].

was eliciting hypothetical opinion testimony before Agent Edwards testified as to the facts -- that the Kel transmissions were only received over a car radio and then recorded by a Sony cassette recorder [38, Tr. 51-52, 57-60].

Judge Lasker denied the suppression motion in a memorandum opinion dated June 7, 1977.* Judge Lasker found that "[i]t is ... not disputed ... that there were at least some audible passages on the Kel recordings", the Kel tapes are "indisputably within the ambit both of Rule 16 and the Jencks Act", "it cannot be said with certainty that there were no portions of the conversations audibly recorded through the use of the Kel machine which were inaudible on the Nagra tapes", "[w]hatever burden the preservation of extra reels or cassettes of tape may impose on the facilities of law enforcement agencies is vastly outweighed by both the defendant's interest in the preservation and availability of all evidence which might arguably prove useful to him and the public interest in minimizing the threat to an otherwise sound prosecution posed by such careless practices", and "government culpability is high" because the F.B.I.'s destruction of the Kel tapes was deliberate [25, pp. 4-6, 9-10]. However, Judge Lasker also found that "there was no evidence that Napoli had tampered with the Nagra machine", "credited" Agent Edwards' testimony that "the Kel recordings

* The opinion is listed as document number 25 in the Index To The Record On Appeal, and is reported at 432 F. Supp. 651.

were seriously inferior to those made on the Nagra machine" [25, p. 7] and denied the suppression motion on the grounds that Agent Edwards destroyed the Kel tapes "in good faith"* and the defendants had not shown that they had been prejudiced by the destruction of the Kels [25, pp. 5-9].

On June 23, 1977, the Government requested Judge Lasker to grant leave to file a nolle prosequi as to defendant Joseph Lapadura. That nolle was recommended by the United States Attorney because of the statement by the Assistant United States Attorney in charge of the case that:

"Since the filing of Indictment 76 Cr. 982, further investigation has demonstrated that a successful prosecution of JOSEPH LAPADURA is not possible" [36(s); Sparber Ex. B, id.].

Judge Lasker granted leave to file the nolle on June 28, 1977. We learned of that several days later and, on July 8, 1977, wrote to Judge Lasker and requested a

* Judge Lasker's conclusion that the deliberate destruction of the Kel tapes was done in "good faith" is apparently based on Agent Edwards' testimony that he discussed the matter with one or two of his fellow agents and they told him that was the practice [25, p.8]. On cross-examination we established that Agent Edwards never discussed the matter with his superiors, or received authorization to destroy the Kel tapes from either his supervisor or his fellow agents [39, Tr. 158-59]. In any event, this Court should not countenance the deliberate destruction of Jencks Act and Rule 16 statements even if a few agents believe that is the "practice." As stated in United States v. Carrasco, *supra*, 537 F.2d at 376: "a course of conduct is not necessarily reasonable merely because it is routine....Whether or not [the agent's] conduct was routine, it was manifestly unreasonable...and is no less a violation of the Jencks Act because it was pursued in good faith." Other decisions that are directly contrary to Judge Lasker's reliance on "good faith" are collected in Section IV(A), *infra*.

pretrial conference to discuss, inter alia, whether the "further investigation", which "demonstrated" that a nolle prosequi should be filed as to a defendant indicted for conspiracy constituted Brady material as to the remaining defendants indicted for that conspiracy [36(o)].

Judge Lasker scheduled a pretrial conference for July 18, 1977, to discuss this and other matters. The Government undertook to write to Judge Lasker, on an in camera basis, and set forth the results of the "further investigation" that demonstrated the impossibility of prosecuting Lapadura. The Court reserved decision on the motion [36(q), p. 2].*

Trial commenced on August 1, 1977. The jury found each of the three defendants on trial guilty on both counts on August 10, 1977.

On October 21, 1977 Judge Lasker sentenced Sparber to a term of imprisonment of one year on Count I, suspended sentence on Count II and placed Sparber on probation for five years. Pending appeal, Judge Lasker continued Sparber's bail status (release on a \$10,000 personal recognizance bond co-signed by his wife).

* At the pre-trial conference the Court denied our motion to dismiss the indictment for lack of a speedy trial, a motion bottomed on the fact that the trial was twice adjourned beyond the 180-day limit of the Speedy Trial Act because of the pregnancy of one of the Government's witnesses, Geraldine Napoli --even though Geraldine Napoli was in the Government's custody (in the Justice Department's "Witness Relocation Program") during the entire period of her pregnancy and thus the Government could have informed the Court and defense counsel of her condition in time to advance the trial date, if necessary. (We discuss this issue in Section IV(D)(1), infra.)

II. THE ISSUES PRESENTED FOR REVIEW

1. Should the indictment have been dismissed, or evidence suppressed, because of F.B I. Agent Edwards' deliberate destruction of the Kel tapes? And should we have been allowed to cross-examine Agent Edwards as to his knowledge, at the time he destroyed the Kel tapes, of the judicial criticisms and sanctions imposed because of the deliberate destruction of Jencks' Act statements?

2. Should the indictment have been dismissed, or a mistrial declared, for lack of a fair trial because of jury prejudice?

3. Should the indictment have been dismissed once it became established, even accepting the testimony of the Government's witnesses, that there was no "extension of credit"? In the alternative, should a mistrial have been declared or the jury instructed to disregard evidence admitted against Sparber on a conspiracy theory, once it became established that at least during the initial period of the charged conspiracy Sparber was merely attempting to recover the jewels Napoli swindled from Jacobs?

4. Should the indictment have been dismissed because of the Government's denial of Sparber's Sixth Amendment Right to a speedy trial?

5. Should the indictment have been dismissed, or this case remanded, for failure of the Government to

satisfy Brady as to the investigation which resulted in the nolle of Lapadura? In addition, did the Court commit reversible error (a) in excluding the Government's admission that "further investigation has demonstrated that a successful prosecution of JOSEPH LAPADURA is not possible," (b) in allowing Napoli to testify as to Lapadura's statements (on the District Court's ruling that Lapadura could be viewed as an unindicted co-conspirator), and (c) in precluding us from cross-examining Napoli to establish that he testified against Lapadura before the grand jury that indicted Lapadura?*

6. Is the Government's subsidization of Napoli, and the license to steal extended by the Government to Napoli, so shocking as to violate due process of law?

7. Should Sparber's conviction be reversed because of errors in the District Court's instructions to the jury, as to "extension of credit" and as to the absence of expert testimony on the issue of tape alteration?

* In connection with our offer of proof as to the latter point we informed the Court that the only evidence against Lapadura, known to us, was Napoli's grand jury testimony [Tr. 488-91]. Thus cross-examination of Napoli, with the Government's admission, would likely establish that not even the Government was prepared to rely on Napoli's word, alone (see Section IV(D)(2), infra).

III. STATEMENT OF FACTS

A. The Government's Case

1. Jack Napoli's Testimony

Jack Napoli was called as the Government's first, and principal, witness. His direct examination was begun with a recitation of the dozens of people he had defrauded, the dozens of checks and other documents he had forged, his counterfeiting activities, and the medical expense invoices he altered while in the Government's "Witness Relocation Program" [Tr. 57-60]. His direct examination was concluded with a cataloguing of his convictions for car theft, forgery, assault, and larceny [Tr. 256].*

According to Napoli, on Thursday, February 12, 1976 (Lincoln's Birthday), he telephoned to Jacobs' jewelry store, identified himself by the alias Jack Karingi, and said that he had been referred to Jacobs by Russell Bufalino

* The Government did not bring out on direct examination, but defense counsel established on cross-examination, Napoli's fraudulent use of aliases, the four pending indictments against him for grand larceny, his perjury before the Grand Jury that voted the indictment now on appeal, the fact that he had earlier had a person incarcerated on a false charge, his many larcenies while in the Justice Department's Witness Relocation Program and the U.S. Marshal's shocking corroboration of his false statements, etc., and the fact that he had become a paid F.B.I. informant as to Bufalino and Jacobs a month or two before he swindled the jewels in question from Jacobs [see, generally, Tr. 257-367, 387-95, 404-18, 495-517].

[Tr. 61-62]. Napoli said that he wanted to buy a diamond engagement ring. Jacobs said it was late and a holiday but he would see what he could do and get back to him at the telephone number provided by Napoli [Tr. 65]. According to Napoli, Jacobs called him back and told him that he would have something for him on Saturday [Tr. 65-66].

Napoli further testified that, on Saturday morning, February 14, he drove in from Bayonne, New Jersey and went to Jacobs' jewelry store at 62 West 47th Street in Manhattan [Tr. 65-66].*

According to Napoli, Jacobs said that he only had a couple of stones that he could show him and that, when Jacobs showed him a four-carat diamond, Napoli said he would take it [Tr. 66]. Jacobs put the stone in a setting and Napoli gave Jacobs a fraudulent \$6,000 check, made out in favor of Jack Karingi and drawn on a defunct business [Tr. 66-67, 443-46]. Napoli said that, in addition to the diamond ring, Jacobs gave him two cocktail rings for the fraudulent check [Tr. 67].

Napoli went on to testify to the repetitive nature in which he procured other jewels from Jacobs by fraud, a total of approximately \$25,000 worth of jewels, and

* Napoli testified that he was alone [Tr. 66] but the 3500 material and Geraldine Napoli testimony established that Napoli lied and that Geraldine -- the woman with whom he was then living -- accompanied him on this and other instances in which he swindled jewels from Jacobs [Tr. 570-76].

used those jewels to pay off loan sharks or raise money for his own pleasures [see, generally, Tr. 68-128].*

The Government then examined Napoli as to the recorded meetings and telephone conversations between Napoli and one or more of the defendants [Tr. 128-208]. Over objection, the recordings of those meetings and conversations were played for the jury and transcripts were distributed as to each recording when it was played [41, GX1-7; 1A-7A, id.].

Prior to cross-examining Napoli, and out of the presence of the jury, we renewed our request for production of the results of the "further investigation" that demonstrated the impossibility of prosecuting Lapadura [Tr. 103-06]. Our request was denied and, when we objected to any testimony by Napoli or others as to statements alleged to have been made by Lapadura, Judge Lasker ruled that the testimony was admissible because "[e]ven though his [Lapadura's] case has been nolle he may be regarded as an unindicted co-conspirator" [Tr. 104].**

* Napoli explicitly admitted on cross-examination that he "swindled \$25,000 in jewelry from Mr. Jacobs" [Tr. 395].

** We submit that this constitutes reversible error because of the Napoli testimony that was then admitted as to Lapadura's statements, e.g., to make sure that Napoli would straighten things out or he would get hurt [Tr. 108-09; see, also, Tr. 170-71]. (In this respect, we pointed out that -- contrary to the Court's ruling as to the admissibility of Lapadura's statements on an unindicted co-conspirator theory-- the Government had stated in its Bill of Particulars that there were no unindicted co-conspirators.) We submit, also, that reversible error was committed when Judge Lasker refused our offer of proof as to the Government's judicial admission that a successful prosecution of Lapadura was not possible, and when Judge Lasker excluded our offer of proof that the Government nolle the case against Lapadura because of its conclusion that Napoli's uncorroborated testimony against Lapadura was incredible [Tr. 488-91].

We had stressed in our opening statement the critical importance to Sparber of our right to cross-examine Napoli [Tr. 18-21]. We began our cross-examination by establishing that Napoli knew how to erase and alter tape recordings and that he kept the cassettes of the telephone conversations in his unsupervised possession for substantial periods of time. We had Napoli admit that pauses and gaps in the recorded conversations might evidence alteration of the tapes [Tr. 368-72], and then replayed one of the telephone tapes and had him admit that he heard a pause or gap in the middle of the recorded conversation [Tr. 383-84; 36(s), Sparber DX A, id.].

In addition to establishing Napoli's repeated false statements to the F.B.I. concerning this case, and his Grand Jury perjuries [e.g., Tr. 387-95], we obtained Napoli's admission on cross-examination that Sparber's first request, as a friend of Jacobs, was that Napoli return the jewels he had defrauded from Jacobs [Tr. 406-07]. We also obtained Napoli's admission that it was not until after Sparber discovered that Napoli had lied as to the whereabouts of Jacobs' jewels, and discovered that Napoli had forged a pawn ticket in an effort to "corroborate" the lie, that Sparber agreed to accept money restitution in lieu of the jewels -- money which Napoli offered to pay with the false statement that it could be raised by his parents [e.g., Tr. 404-07, 496-98, 507-08; 36(s), Sparber DX D].

2. Geraldine Napoli's Testimony

As its second witness, the Government called Geraldine Napoli. She testified that Sparber said "if Jack doesn't do the right thing we will take care of the kids first, then you and then him" [Tr. 542]. On cross-examination, we established that neither Geraldine nor Jack had ever made this accusation against Sparber until Jack Napoli was recalled before the Grand Jury to admit that he had earlier lied to the Grand Jury when he said that he was married to Geraldine in an effort to get her, and her children, included in the Government's lucrative and much abused "Witness Relocation Program" [Tr. 3 94, 569-70].*

When we attempted to cross-examine Geraldine Napoli as to the notoriously bad reputation of Jack Napoli -- because the indictment charged a conspiracy to injure and injury to the person, reputation and property of Jack Napoli -- the jury was instructed that the Government had abandoned its claim of injury to Napoli's reputation [Tr. 556-60].

3. F.B.I. Agents' Testimony

The Government also called five F.B.I agents to testify during its case-in-chief.** We objected and moved

* Besides what he stole by using his assumed name in the program, Napoli received approximately \$46,000 from the Government while in the program (see Section IV(D)(3), infra).

** In addition, the Government called an owner-operator of a Florida Holiday Inn to testify as to business records, and informed the jury of a stipulation as to telephone company records [Tr. 594-603; 691].

for a mistrial when the first, Agent Moody (called for the stated purpose of identifying Bufalino's voice on the tape recordings), testified that he had had conversations with Bufalino beginning in March of 1973 [Tr. 604-05]. We argued that, particularly in the context of the jury's substantial apprehension about intimidation (which we discuss in Section IV(B), infra), it was "unnecessarily prejudicial to elicit testimony as to several years of F.B.I. conversations with Bufalino for the purported purpose of voice identification [Tr. 605-07]. The Court overruled our motion and denied our objections. The Government then had Agent Moody testify that he had conversations with Bufalino, some of which lasted for hours, in March 1973, June 1973, early 1974, and May 1974 [Tr. 607-08].

The other four F.B.I. agents (Young, Sadowski, Cunningham and Peter) testified to the April 12, 16 and 20 recording devices used by Napoli, the F.B.I.'s receipt of the Nagra tapes prepared by Napoli, and surveillance activity near Vesuvio's in April 1976 [Tr. 617-36, 692-707].

B. Sparber Motions At The
Close Of The Government's Case

Sparber made three motions at the completion of the Government's case-in-chief. First, Sparber renewed his motion for a mistrial and, in the alternative, moved to strike the direct examination of Napoli because of the Government's deliberate destruction of the Kel tapes (see Section IV(A), infra). The Court denied that motion [Tr. 709].

Second, Sparber renewed his earlier motion for a mistrial because of the cumulative events that unfairly prejudiced the jury (see Section IV(B), infra). We informed Judge Lasker that we had reviewed the transcript of the Court's in camera voir dire of the jurors, which established that the jury had discussed episodes in which at least three or four jurors believed that spectators had deliberately tried to engage them in conversation or otherwise intimidate them, and we expressed our concern that the jury associated those activities with one or more of the defendants on trial, as Judge Lasker said he did [Tr. 229, 709-10]. We also reminded Judge Lasker of the manner in which the potential for jury prejudice was exacerbated by such episodes as the Government's examination of Agent Moody as to his surveillance and conversations with Bufalino as long ago as 1973 [Tr. 710]. And we brought to Judge Lasker's attention our information that, while counsel and the Court were in the robing room, the jurors had been discussing various aspects of the case [Tr. 710-11]. Judge Lasker expressed his concern about the subject, but said that he was convinced that the jury was not adversely affected by such matters and denied the motion [Tr. 710-13].

Third, Sparber moved to dismiss the indictment on the ground that, even if the testimony of the Government witnesses was accepted, there was no "extension of credit" because Napoli had admitted that [Tr. 713-14]: (a) he obtained the jewels from Jacobs by fraud, (b) Sparber began

by attempting to obtain the return of that stolen property and (c) Sparber did not attempt to obtain money restitution until after he had discovered that Napoli had forged a pawn ticket, lied about the whereabouts of the jewels, and could not return them. Other defense counsel, with whom we joined, argued that the present facts did not fall within the limited "class of activities" governed by 18 U.S.C. §894 [Tr. 715-16].

The Government responded by arguing that Napoli was obligated to Jacobs in the amount of \$25,000 and it was irrelevant how that obligation arose [Tr. 716]. The Government added that Jacobs certainly expected repayment of the money "farther down the line" [Tr. 717]. On that basis, we moved to strike all evidence admitted against Sparber on a conspiracy theory during the time that Sparber was merely attempting to obtain the return of the jewels and prior to the time -- "farther down the line" -- at which one or more of the defendants sought money restitution [Tr. 718-19]. Judge Lasker denied these motions, after listening to the argument of counsel and after reviewing the Court's earlier determination of a related pretrial motion [Tr. 713-24].

C. Sparber's Case

1. Linda Sparber's Testimony

As its first witness, Sparber called his wife, Linda, who testified that she accompanied Sparber to Johnnies Italian Restaurant and that Sparber never threatened Geraldine or anyone else that evening [Tr. 728-42].

2. Agent Edwards' Testimony

Next, Sparber called Agent Edwards who testified that he had interviewed Jack Napoli several times after the time the Napolis now contended that Geraldine was threatened by Sparber in Johnnies and that no complaint was made of any such threat prior to the time that Napoli was recalled before the Grand Jury to explain his earlier Grand Jury perjury --just before Jack and Geraldine were placed in the Government's Witness Relocation Program [Tr. 781-97].

Agent Edwards admitted that one of those interviews was just three days after the alleged threat, but Napoli made no mention of any threat in Johnnies [Tr. 784-85; GX3501, id.]. The agent also admitted that Napoli did not complain about any such threat during a lengthy interview conducted by Government's counsel one day prior to Napoli's testimony as to such a threat in an effort to explain that he had earlier perjured himself to get Geraldine into the Witness Relocation Program [Tr. 796; GX3505, id.].

IV. ARGUMENT

A. The Indictment Should Have Been
Dismissed, Or Evidence Suppressed,
Because Of The F.B.I.'s Deliberate
Destruction Of The Kel Tapes

We submit that Judge Lasker erred, in several respects, when he declined to impose sanctions after it was established that the F.B.I. had deliberately destroyed Kel tapes of Napoli's Jencks Act statements. First, Judge Lasker erred because, in light of the F.B.I.'s deliberate (and reckless) destruction of the Kel tapes, Judge Lasker should have granted our suppression motion without reaching any question of "prejudice" to the defendants. In any event, Judge Lasker erred in obligating Sparber to prove prejudice; if the issue was reached it should have been the Government's burden to prove lack of prejudice. Furthermore, if reached, the Government's burden of proof as to lack of prejudice should have been applied strictly and, as so construed, the Government has failed to make a sufficient showing of lack of prejudice.

The hearing before Judge Lasker conclusively established that F.B.I. Agent Edwards deliberately destroyed the Kel tapes at a time when, as the "Case Agent" in charge of the case, he knew it was his duty to collect Jencks Act materials and turn them over to the United States Attorneys'

Office.* There is no question but that, at the time Agent Edwards deliberately destroyed those Kel tapes of Napoli's conversations with the defendants, he knew that Napoli would be called by the Government to testify in the event there was an indictment, and he knew that the Kel tapes were sufficiently audible to constitute Jencks Act statements of Napoli. There is also no question but that, at the time Agent Edwards deliberately destroyed the Kel tapes, he knew of Napoli's notorious reputation as a confidence man, swindler, and liar.**

There is every reason to believe that, when Agent Edwards deliberately destroyed the Kel tapes, he knew that he was destroying evidence of potentially critical importance to an assessment of Napoli's suspect credibility. Someone of Agent Edwards' substantial experience must have realized that the Government's case was bankrupt if it consisted only of the testimony of such an untruthful informant, and that tapes of that informant's conversations with the defendants would constitute the cornerstone of the Government's case. For example, the Government argued throughout the trial that Bufalino threatened and kicked

* The facts relating to this deliberate destruction of Jencks Act statements are marshalled at pp. 5-12, supra -- with extensive citations to the hearing testimony.

** By the time he destroyed the tapes it is probable that Agent Edwards even knew that Napoli had made repeated false statements to the F.B.I.

Napoli on April 12 to collect extensions of credit [41, GX1A, id.; e.g., Tr. 10].* Bufalino contended that he was angry at Napoli because of Napoli's unauthorized use of Bufalino's name and that any complete recording of his conversation with Napoli on April 12 should have included his words tying this motive to his angry statements to Napoli [Tr. 16-18]. The Nagra recording of that conversation, marked by substantial background noise and music, did not reproduce Bufalino's words regarding the use of his name, and Napoli, an inherently incredible witness, admitted and then denied on cross-examination a connection between the angry words and his use of Bufalino's name [Tr. 361-62]. Thus, the destruction of the Kels prevented us from determining that Bufalino's angry remark was inadmissible against Sparber (i.e., not made pursuant to any conspiracy to collect an "extension of credit").

We submit that this unilateral decision to destroy the Kel tapes recklessly usurped the judicial function of

* It cannot be disputed that the Government considered the Bufalino words and actions of April 12 as a material part of their case. The Government quoted the Nagra-taped words of Bufalino in its opening statement and in its closing argument [Tr. 10, 847, 858-59].

determining what should be produced by the Government -- pursuant to both the Jencks Act and Rule 16-- and that this deliberate destruction should not be countenanced by this or any other Court.* Judge Lasker, however, denied relief because he found that Agent Edwards acted in "good faith" and because he found that the defendants had not established that they had been prejudiced by the destruction of the Kel tapes.

As noted at pages 7-11, supra, Agent Edwards' destruction of the Kel tapes was not shown to be in "good faith". It was a deliberate and reckless destruction of critically important Jencks Act statements of an inherently incredible witness, potentially the Government's principal witness. Proof of deliberate destruction is uncontested. Proof of recklessness --such as knowledge of the central importance of tape recordings and the failure to ascertain that the destroyed Kel tapes did not include audible portions which were inaudible on the Nagras-- is substantial.

* Clearly Judge Lasker would have ordered the Kel tapes produced if Agent Edwards had not destroyed them. We wanted to listen to them; we asked to listen to them, without knowing of their destruction, to probe the gaps and inaudible portions of the Nagra recordings and to assess the possibility that Napoli had altered the Nagra recordings. Even in the very unlikely event that Judge Lasker had ruled that the Kel tapes need not be produced, they would have had to be preserved so that this Court could review Judge Lasker's ruling. 18 U.S.C. §3500(c). By what conceivable right can the F.B.I. deliberately and unilaterally destroy a Jencks Act statement which a District Judge is obligated to retain, even after the question of production has been litigated and after the District Court has ruled against production?

Our efforts to confirm the recklessness of that deliberate destruction were limited by the Court's ruling that we could not cross-examine Agent Edwards as to his knowledge of previous decisions in which courts have criticized, and imposed sanctions as the consequence of, the deliberate destruction of Jencks Act statements.* In any event, "good faith" is no defense. United States v. Carrasco, 537 F.2d 372, 376 (9 Cir. 1976):

"For the purpose of this case, we assume that [the agent] thought that he was merely following routine procedure. However, a course of conduct is not necessarily reasonable merely because it is routine. 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' [citation omitted]... Whether or not [the agent's] conduct was routine, it was manifestly unreasonable ... and is no less a violation of the Jencks Act because it was pursued in good faith";

United States v. Lonardo, 350 F.2d 523, 529 (6 Cir. 1965):

"In the case before us we see no need to characterize the destruction of these statements as in good faith or bad--as honest or corrupt. These were no long lost documents or clerical filing errors. The destruction was deliberate; it was on the eve of trial; it was accomplished by the government agent in charge of preparing evidence for the prosecution of the case. The fact that the agent who destroyed them may have done so in reliance upon F.B.I. regulations (or in good faith belief that such existed) does not alter the nature of the sanctions imposed by the statute";

* As noted at pp.8-9, supra, we submit that Judge Lasker erred in curtailing our cross-examination as to Agent Edwards' reckless disregard of such criticisms and sanctions.

Lee v. United States, 368 F.2d 834, 837-38 (D.C. Cir. 1966):

"Neither is there any reason to think that the destruction of the reports occurred in bad faith or otherwise than in an ordinary course of business devoid of any conscious purpose to hamper the defense. But the Jencks Act does not embody in terms any 'good faith' exception...."

"We decide only that, in the context of this record, the motion to strike was well within both the letter and the spirit of the statutory direction, and should have been granted."

In denying defendants' motion to suppress, Judge Lasker distinguished Lonardo as a case where there was a "hint of bad faith". The "hint of bad faith" in Lonardo, however, was the deliberate destruction by the Government agent in charge of the case, on the eve of trial, in purported reliance upon routine F.B.I. procedures and, here, Case Agent Edwards deliberately destroyed the tapes on the eve of the grand jury testimony of Napoli in reliance on discussion with two fellow agents, without even checking with or obtaining the authorization of his supervisor (see p. 12, n.1, supra). In any event, the Sixth Circuit in Lonardo said it found "no need" to characterize the destruction as in good or bad faith; it found that the destruction of a Jencks Act statement was deliberate and --on the facts of that case-- held that it would have been inadequate to merely strike the witnesses' testimony and that the District Court should have declared a mistrial (350 F.2d at 529).

Judge Lasker distinguished Carrasco as a case where the prejudice was so paramount that the good faith of

the intentional destruction was irrelevant. However, as previously noted, the Carrasco Court stated that good faith is no defense and went on to say (537 F.2d at 376):

"[G]ood faith is the norm from which neither adverse inferences nor benefits flow."

Judge Lasker's reliance on this Court's decision in United States v. Miranda, 526 F.2d 1319 (2 Cir. 1975) cert. denied, 426 U.S. 923 (1976), is similarly misplaced. Miranda was a case in which the destruction of Jencks Act statements was "inadvertent," as the Court clearly pointed out (526 F.2d at 1328):

"[T]his is not a case of intentional, deliberate ...loss...of evidence by government agents in which prophylactic sanctions against the Government would be appropriate. The loss of the tape recording by the agents was merely inadvertent or negligent."*

Neither did United States v. Bryant, 448 F.2d 1182, 1184 (D.C. Cir. 1971) (Bryant II), also cited by Judge Lasker, "countenance" the deliberate destruction of discoverable evidence. Bryant II held that the full sanctions of the Jencks Act would not be retroactively applied to a good faith destruction in which a Jencks Act tape was merely "lost". United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971)

* Judge Lasker referred to this passage in Miranda (we brought it to his attention) but characterized it as dicta which "can be read to suggest that a showing of intentional destruction is alone enough to warrant suppression" but stated his disagreement with that interpretation (25, pp. i-ii, n.5).

(Bryant I). However, Bryant II forewarned the Government that, in the future, investigative agencies would not be allowed to excuse non-production of material by claiming it contained nothing of interest to defendants (448 F.2d at 1184). Thus Bryant II presages this Court's later admonitions, in United States v. Mase, 556 F.2d 671, 676 (2 Cir. 1977) and United States v. Anzalone, 555 F.2d 317, 321 (2 Cir. 1977), that the F.B.I. should retain even non-Jencks Act interview notes.

Judge Lasker's reliance on United States v. Augello, 451 F.2d 1167 (2 Cir. 1971) cert. denied, 405 U.S. 1070 (1972) is also misplaced. In Augello the destroyed tape was "unintelligible" (451 F.2d at 1170).

Apparently Judge Lasker was led into error by the Government on the issue of "prejudice". The Government contended before Judge Lasker that [10, p.7]:

"[t]he exercise of the exclusionary rule here where the destruction of the tapes was done in good faith and the defendants can show no prejudice to themselves nor any benefit to the Government, is unwarranted."

Judge Lasker noted that "the government argues, the defense should be required to make a showing of prejudice..."

[25, p.5] and denied relief on the conclusion that the defense had not made such a showing [25, pp. 7-10].

We submit that this is clear error. There is no burden, nor should there be any burden, on the defense to make a showing of prejudice --even where the destruction of Jencks Act materials was inadvertent. Any system which would obligate a defendant to show lack of prejudice as the

result of the Government's deliberate destruction of Jencks Act statements --a showing that may very well require proof as to the contents of the statements destroyed-- is unconscienable and would brook the most fundamental denial of due process.

We submit that if the question of "prejudice" is reached at all, given that the destruction was deliberate, it should be the Government's burden to prove that the deliberately destroyed Jencks Act statements are not even "material" to the defense. As stated in the most recent edition of PROVING FEDERAL CRIMES, p.26 (6th Ed. 1976):

"In the Second Circuit, the legal standard to be applied in determining whether a new trial should be granted when the Government fails to produce Jencks Act material depends on whether the suppression was deliberate or inadvertent. If the Government deliberately suppresses evidence... a new trial is warranted if the evidence is merely material or favorable to the defense. But if the Government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975); United States v. Miller, 411 F.2d 825 (2d Cir. 1969). The court has warned against explaining a failure to produce such material as a breakdown in communication in the United States Attorney's Office. United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert. denied, 420 U.S. 962, 421 U.S. 949 (1975)."

Strict application of the Government's burden is in full accord with the views stated by the Supreme Court, that the closely related question of "harmless error" must be "strictly applied in Jencks Act cases." Goldberg v. United States, 425 U.S. 94, 111 n.21 (1976):

"Since courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial, Clancy v. United States, 365 U.S. 312, 316 (1961), the harmless-error doctrine must be strictly applied in Jencks Act cases. Campbell v. United States, 373 U.S. 487, 497 n. 14 (1963) (Campbell II); Rosenberg v. United States, 360 U.S. 367, 371 (1959); id., at 376 (Brennan, J., dissenting). See Kotteakos v. United States, 328 U.S. 750, 765 (1946); Gordon v. United States, 344 U.S. 414, 422-423 (1953)."

Applying the correct legal standard to the facts of this case, we urge this Court to either dismiss the indictment because of the F.B.I.'s deliberate and reckless destruction of the Kel tapes or, in the alternative, remand the case with the direction that Napoli's testimony as to the recorded conversations with the defendants, as well as the Nagra recordings, be ordered suppressed. This relief is warranted, we submit, because the destruction was deliberate and because no burden should be placed on Sparber to prove lack of prejudice. It is also warranted because there is no showing that the destruction was harmless --particularly when considering the fact that the Government expert, Ginsberg, did not even attempt to assess the relative audibility, etc. of the Nagra recordings of April 16 and 20 with the SK8 suitcase recordings of the Kel transmissions on those dates.*

* See Statement of Facts, supra, at pp. 10-11.

B. The Indictment Should Have Been
Dismissed, Or A Mistrial Declared,
For Lack Of A Fair Trial

We submit that Judge Lasker erred in denying repeated motions for a mistrial and in denying our request to examine alternate jurors in the Court's presence after the alternates had been dismissed but prior to any word as to the jury's verdict -- so that we could explore and confirm jury prejudice of such a substantial nature as to deny Sparber's right to a fair trial.

Judge Lasker called defense counsel into the robing room on the opening of the third day of trial, and directed the deputy clerk to repeat for defense counsel what had already been told to the Court [Tr. 226]. The deputy clerk said that [Tr. 226-27]:

"The jurors called me into their room and they said they are quite nervous. They seem to, every time they go in or out a couple of the spectators are glaring at them. They said no matter where they went they kept bumping into these people, elevators, outside."

The morning before, prior to the taking of any testimony, the Government had called to the attention of the Court and defense counsel that several spectators had been seen in the presence of the jurors outside of the courtroom, and the Government requested that the Court direct that the spectators be kept in the courtroom until

the jurors had gone into the elevators [Tr. 51-52]. The Court granted that relief, without objection by defense counsel, and directed the spectators to remain in court for at least five minutes after each session ended "because it would not be proper for the jurors to be in the presence of spectators at the risk of overhearing conversation" [Tr. 55].

After listening to the deputy clerk's statement, we accepted Judge Lasker's suggestion that the Court question every member of the jury to determine whether or not they believed anything had happened that would prevent them from rendering a fair verdict [Tr. 228-31]. The Court then conducted a voir dire of each juror, in the robing room and out of the presence of the defendants or their counsel. In answer to the Court's questions, the forelady said that [Tr. 232]:

"I have taken notice to three of the big guys that sit over. At first I thought they were part of the jurors. When they first started talking while I was sitting back and since I was elected I found they wasn't part of the jury. I find they continue to talk as of yesterday. We were taking the elevator down for lunch and it was a little slow about coming. I said when is Con Edison going to send me a bill for this month. The big guy, blond silver hair fellow says oh, yes, just like that case going on in there. They are trying to get \$40,000 for some tax something. I saw where he was coming from and I hushed immediately. He brought me back to Monday. Everywhere the three of us went yesterday we saw one or two. Then another one, also. I brought it to the rest of the jurors' attention. Had it happen to them and while they are sitting back there all the time they are making eyes and they are smiling."

The forelady did not answer the Court's question, "Have they [the spectators] influenced you in any way?" Instead, in response to that question, the forelady said "I am for law and peace" [Tr. 232].*

Other jurors described other instances in which spectators had approached them and attempted to speak to them [Tr. 234-37, 240-43]. The Court's voir dire established that the jurors had discussed these several instances [e.g., Tr. 232, 238]. Jurors described instances in which spectators had followed them and attempted to discuss the case [e.g., Tr. 232, 236, 238]. Other jurors testified as to ways in which they attempted to deal with what they interpreted as efforts to intimidate them [e.g., Tr. 236-37]. Clearly at least some of the jurors were "unnerved" by the situation [Tr. 242-43].

Defense counsel renewed their motions for a mistrial when they were called into the robing room and received Judge Lasker's report as to his voir dire [Tr. 244-55].

* We believe it noteworthy that the Court did not ask the forelady, or any of the other jurors, about the substance of their conversations regarding the efforts of the spectators to perhaps intimidate them, and we believe it also noteworthy that the Court did not ask the forelady or other jurors whether any of them associated the spectators' activities with one or more of the defendants (as we later learned the judge did [Tr. 251-52]). As we elaborate at pp. 41-42, infra, we submit that Judge Lasker erred when he denied our request for a limited hearing (examination of the two alternate jurors) as to these points not covered by the Court's voir dire.

We expressed our distress about the situation, particularly in that it had happened after direct examination of Napoli (in which he testified that several threats had been made against him) and prior to any cross-examination, and we expressed our concern that the jury would think that this was an organized crime case in which one or more of the defendants were attempting to use the spectators to intimidate the jury [Tr. 248-49].* Judge Lasker expressed his personal observation that he associated the spectators with Bufalino [Tr. 251-52] but denied the motions for a mistrial with the statement that "even if the jury thinks that [the defendants] are connected with members of the audience they will get a fair trial" [Tr. 251].

Other prejudicial events transpired during the course of the trial. For example, for the purported purpose of identifying Bufalino's voice, F.B.I. Agent Moody was allowed to testify as to his several conversations with Bufalino starting in 1973 (see p. 21, supra). And the Government was allowed to have Napoli testify, over our objections and motion for a mistrial, that he was "relocated" (from California) because of anonymous death threats [Tr. 679-81]. We renewed our motion for a mistrial, at the close of the Government's case, because of these cumulative events, but that motion was denied (see p. 22, supra).

* The Government had begun its opening statement by characterizing the case as "a deliberate and organized conspiracy..." [Tr. 4].

Immediately upon the dismissal of the alternate jurors, before the jury began its deliberations, we asked the Court's leave to conduct our own voir dire into the issue of jury prejudice. We asked to be allowed to conduct such an examination of the alternate jurors on the record and in the presence of the Court and Government counsel [Tr. 1012-13].

The Government opposed our request so Judge Lasker allowed the jury to commence its deliberations and discussed our request in the robing room [Tr. 1015-17]. We reminded Judge Lasker that the Court's voir dire had established that at least three of the jurors believed that one or more of the spectators had approached them and engaged them in conversation and that the forelady had discussed the situation with the entire jury [Tr. 1010-18]. We expressed our deep concern that, without basis, the jurors associated the spectators' activities with one or more of the defendants, and we specifically requested permission for a limited hearing so that we could examine the alternates as to two areas: first, what did the forelady tell the jurors and what did the jurors say among themselves concerning the spectators' actions; and, second, did anybody say anything that would associate the spectators' activities that were complained about with one or more of the defendants [Tr. 1018-20]. The Government objected to our asking any questions of the alternates and the Court denied our request [Tr. 1021-23]. We submit that the totality of these circumstances

demonstrates a fundamental deprivation of Sparber's right to a fair trial.

As stated by Mr. Justice Holmes, in Patterson v. Colorado, 205 U.S. 454, 462 (1907):

"The theory of our system is that the conclusion to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Any private communication with a juror about the matter on trial before that juror is presumptively prejudicial, and creates a heavy burden upon the Government to establish after a "hearing with all interested parties permitted to participate" that any such contact with the juror was "harmless to the defendant." Remmer v. United States, 347 U.S. 227, 229-30 (1954):

"In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. [citations omitted].

"...The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action ex parte on information such as was

received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

We submit, with respect, that the jurors' responses to Judge Lasker's brief and leading questions do not disspell the heavy presumption of prejudice which rests upon the Government. E g., United States v. Ferguson, 486 F.2d 968 (6 Cir. 1973); Stone v. United States, 113 F.2d 70 (6 Cir. 1940). On the contrary, many of the remarks of the jurors confirm that they thought the spectators were attempting to intimidate them -- and it is more likely than not they determined, without basis, that the spectators were acting on behalf of the defendants. Apparently, the jury's reaction was that they would secure "peace and order" with a quick conviction.

To the extent that there is any question concerning whether Judge Lasker's brief and limited voir dire satisfied the substantial burden mandated by Remmer, we submit that defense counsel should have been allowed to examine the alternate jurors. There was no prospect that such an examination would in any way interfere with the jurors' deliberations, or in any way exacerbate their apprehensions, because they had already begun their deliberations and would never know of the voir dire until after they had reached their verdict. The demands on the time of the

alternate jurors and the Court would have been minimal, particularly when compared with the fundamental nature of the defendant's right to a fair trial and the fact that the examination would be limited to questions of the jurors' discussions and their possible association of the spectators' activities with one or more of the defendants. We specifically requested such a limited hearing and, as stated by this Court in United States v. Gersh, 328 F.2d 460, 464 (2 Cir. 1964), if such a request is made, it should be granted:

"Save when the conceded facts as to outside contact with a juror conclusively show prejudice, the court is not bound to order a new trial but rather to conduct a hearing in which the facts can be established, with the Government having the burden of showing that any such contact 'was harmless to the defendant'. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), 350 U.S. 377; 76 S.Ct. 425, 100 L.Ed. 435 (1956); Wheaton v. United States, 133 F.2d 522 (8 Cir. 1943). If a request for such a hearing had been made, it should have been granted." (Emphasis supplied)

- C. The Indictment Should Have Been Dismissed,
Or A Motion To Strike Granted, Once It
Became Established That -- Even Accepting
The Testimony Of The Government's Witnesses --
There Was No "Extension Of Credit" Or Effort
To Collect An "Extension Of Credit"

We submit that Judge Lasker should have dismissed the indictment once it became established that, even accepting the testimony of the Government's witnesses, there was no "extension of credit". In the alternative, we submit that Judge Lasker should have declared a mistrial, or at least instructed the jury to disregard certain evidence admitted against Sparber on a conspiracy theory, once it became established that at least during the initial period of the charged conspiracy Sparber was merely attempting to recover the jewels Napoli swindled from Jacobs.

There is no dispute that Napoli obtained the \$25,000 worth of jewels from Jacobs by fraud. For example, Napoli obtained the first jewel (the diamond engagement ring) with a fraudulent check drawn on a defunct company.* Thus, at least as to this first transaction, the jury should have been instructed that there was no extension of credit as a matter of law.

Napoli also swindled jewels from Jacobs in subsequent transactions, by resort to various fraudulent schemes. Napoli admitted that he had no intention of paying for the

* The facts relative to Napoli's fraudulent acquisition of the jewels from Jacobs, and Sparber's efforts to recover those jewels, are marshalled at pages 16-19, supra.

jewels in any of these instances. He intended to steal them from the very beginning of his relationship with Jacobs and he specifically admitted on cross examination that he swindled the entire \$25,000 worth of jewelry from Jacobs (p. 18, supra).

The legislative history of 18 U.S.C. §891, et seq., establishes that Congress employed the definition of "extension of credit" (18 U.S.C. §891) to attack the "class of activities" of organized crime -- such as loan sharking, gambling, drugs, and protection (1968 U.S. Code Cong. & Admin. News p.2025 et seq.). Finding that organized crime is interstate and international in character, Congress imposed criminal sanctions upon the "class of activities" of organized crime. The control of these activities was said to be a valid exercise of Congress' power to regulate commerce and to establish uniform and effective bankruptcy laws (Findings and Declaration of Purpose, 18 U.S.C. §891, et seq.).

This Congressional exercise of power has been sustained as to the specific class of activities of organized crime. In Perez v. United States, 402 U.S. 146 (1971), for example, a loan-sharking conviction was affirmed without proof of actual interstate connection. The Court concluded that loan-sharking was within the "class of activities" defined by Congress and that this class of activities was within the reach of federal power under the Commerce Clause.

Similar decisions have found gambling activities* and drug financing** to be within the class of activities proscribed by Congress.

Unlike loan sharking and the rest of the "class of activities", however, there is nothing to suggest that a shopkeeper's efforts to obtain the return of fraudulently misappropriated property, or even money restitution for such property taken by larceny, is exclusively or substantially within the "class of activities" of organized crime. By that we do not suggest that organized crime limits its activities to loan sharking or drugs or gambling. There may be other traditional activities of organized crime that will be found to be within the class of organized criminal activities and, hence, within the reach of 18 U.S.C. §891, et seq Labor racketeering is one such activity that comes to mind. But surely the criminal sanctions of the Consumer Credit Protection Act cannot be extended to the point where we have a general Federal police power -- one at variance with all traditional concepts of Federalism -- which could reach all shopkeepers in this country who use threats to obtain the return of stolen property, and which might even negate such common law precepts as the right to employ reasonable force and threats of force in "hot pursuit" of stolen merchandise.

* United States v. Andrino, 501 F.2d 1373 (9 Cir. 1974); United States v. Keresty, 465 F.2d 36 (3 Cir. 1972); and United States v. Briola, 465 F.2d 1018 (10 Cir. 1972).

** United States v. Bonanno, 467 F.2d 14 (9 Cir. 1972).

Section 894 has been held to be "sustainable" on the alternative basis that, in enacting the statute, Congress exercised its power to make uniform laws concerning bankruptcy. United States v. Fiore, 434 F.2d 966, 970 (1 Cir. 1970). We submit that only debts "dischargeable in bankruptcy" can be dealt with on this basis. United States v. Biancofiori, 422 F.2d 584, 586 (7 Cir. 1970).

Sparber's attempts to recover the swindled jewels, and his efforts to obtain money restitution after his discovery that Napoli had lied about the whereabouts of the jewels and could not return them, are not within the "class of activities" of organized crime. Nor can Napoli's swindles give rise to debts dischargeable in bankruptcy. 11 U.S.C. §35(a)(2). Enforcement of 18 U.S.C. §894 against Sparber is an invalid and unconstitutional extension of Congressional power.

Judge Lasker denied defendants' pretrial motion to dismiss the indictment. He held that the possibility that the underlying debt may itself have been incurred in the course of an illegal scheme by Napoli to defraud Jacobs did not exclude extortionate collection practices of such debt from Section 894. This ruling was made before it had been established that, from the outset, Napoli never intended to

pay for the jewels, and just swindled them from Jacobs. It failed to consider the critical importance of such evidence on the question of whether a debt dischargeable in bankruptcy arose out of the transaction. Instead, Judge Lasker relied on two decisions which are distinguishable from the transactions as established at trial by the Government's witnesses, particularly the first transaction in which Napoli obtained the \$6,000 in jewels by means of a fraudulent check -- not on the basis of any "extension of credit".

United States v. Briola, 465 F.2d 1018, 1020

(10 Cir. 1972) related to gambling activities. The collection of debts arising out of this "class of activities" of organized crime has traditionally been within the proscription of Section 894. United States v. Roberts, 546 F.2d 596, 598 (5 Cir. 1977).

The second decision relied on by Judge Lasker, United States v. Annerino, 495 F.2d 1159 (7 Cir. 1974), involved an embezzlement of partnership funds and the unauthorized use of another's credit cards. Such a debt is not dischargeable in bankruptcy, ab initio. However, in Annerino a subsequent agreement apparently settled the embezzlement claim and replaced it with a promise to repay the funds. E.g., 495 F.2d at 1160. Such overriding agreement is a debt dischargeable in bankruptcy. E.g., In re Kelly,

250 F.Supp. 297 (N.D. Calif. 1965). Therefore, the attempted collections in Annerino served to frustrate the bankruptcy laws and fell within that "class of activities" validly prohibited by Section 894.

Judge Lasker's denial of defendants' motion to dismiss the indictment at the close of the Government's case similarly failed to distinguish debts dischargeable in bankruptcy from the transactions as described by the evidence of the present case.

His charge to the jury exacerbated this error. There, he instructed the jury that [Tr. 996]:

"[T]he mere fact that the property here taken was taken without paying for it does not prevent it from being an extension of credit within the meaning of the law, just as much as an ordinary loan would be an extension of credit within the law."

This charge wholly prevented the jury from applying the correct law to the facts in evidence. It did not distinguish debts dischargeable in bankruptcy from debts not dischargeable in bankruptcy and it did not specify that the debt must be deferred to be an "extension of credit" (see Section IV(D)(4), infra).

Sparber's initial efforts were directed solely to the recovery of the stolen jewels, not to the collection or attempted collection of an "extension of credit". These specific recovery attempts are outside the proscription of Section 894 as a matter of law, and evidence -- particularly

hearsay statements of others --should not have been admitted against Sparber on a conspiracy theory during this period.

It was only after Napoli's continued lies and false leads made recovery of the jewels impossible that money restitution was sought by Sparber [Tr. 404-07]. We submit that such attempts to recover money restitution for stolen jewels are not within the constitutional ambit of Section 894. There was no proof and there can be no claim that such recovery attempts are within the organized crime "class of activities" and since there was no showing that the underlying larceny of the jewels was extinguished by the seeking of money restitution, the recovery attempts are directed to a debt not dischargeable in bankruptcy and therefore cannot frustrate the federal bankruptcy laws.

D. Other Errors That Require Dismissal
Or Remand

1. The Denial Of A Speedy Trial

We submit that Judge Lasker also erred in refusing to dismiss for lack of a speedy trial, because the nine-month delay between indictment and commencement of trial violated Sparber's rights under the Sixth Amendment, was unnecessary and directly chargeable to the Government, was violative of the provisions of the Southern District Plan For Achieving Prompt Disposition Of Criminal Cases, and was prejudicial to Sparber.

The first pre-trial conference in this case was held on November 18, 1976. The trial was then set to commence on March 28, 1977. On January 21, 1977, the Government requested an adjournment of the trial date from March 28, 1977 until at least May 15, 1977 --on the ground that Geraldine Napoli was expected to deliver a child on March 29, 1977, and in the opinion of her obstetrician should not travel for several weeks thereafter [21]. Geraldine Napoli was said by the Government to be an "essential witness" because of the expectation that her testimony "would strongly corroborate" that of Jack Napoli with respect to an unrecorded meeting with Michael Sparber and Russell Bufalino [21].

Sparber opposed the Government's application for an adjournment of the trial date based on the "unavailability" of this witness whose testimony would no more than "corroborate" the testimony of another Government witness. We

pointed out that the delay would prejudice Sparber's prospect for employment and create additional problems for his family [36(f), p. 1]. Judge Lasker found that the adjournment was warranted, and the delay excludable from the 180-day period within which the defendants should have been brought to trial [23]. Accordingly, in a memorandum dated February 11, 1977, Judge Lasker ordered that trial would commence on May 31, 1977 [23].

On May 16, 1977 the Government requested a second adjournment of the trial date -- on the ground of Mrs. Napoli's poor health following the birth [15]. We opposed on the same grounds as previously urged [36(1)]. On June 3, 1977, Judge Lasker found that the adjournment was warranted and that the delay involved was excludable from the 180-day period. He adjourned the commencement of trial to August 1, 1977 [36(m)]. As a result of the two adjournments, the trial commenced about three months after the expiration of the 180-day period of Paragraph 5(a)(2) of the Southern District Plan and about 4-1/2 months after the originally scheduled trial date.*

Defendant Sparber recognizes that delays resulting from the unavailability of an "essential witness" are normally

* The Court denied our motion to dismiss the indictment for lack of a speedy trial at the July 18, 1977 pre-trial conference [p. 13, supra].

excluded from the computation of time under the Southern District Plan (Paragraph 10(a) and 18 U.S.C. § 3161(h)(3)(A)). However, the delay in this case should not be so excluded from any time computations. It is wholly attributable to the government and not the "unavailability" of Mrs. Napoli.

Mrs. Napoli was relocated by the Government on April 20, 1976 [Tr. 678]. She and her family remained under the close supervision of the United States Marshall's Service from this date until her appearance at trial. Her medical expenses were paid by the Marshall's Service under the Witness Relocation Program [Tr. 483, 507]. To suggest that the Government did not or should not reasonably have known at the November 18, 1976 pre-trial conference that Mrs. Napoli, then about five months pregnant, was expected to deliver her child in March, 1977 is unacceptable. In any event, the state of Mrs. Napoli's pregnancy had to have been recognized well before the January 10, 1977 date the information was finally communicated to Government's counsel [21, 43].

Had the trial date been set earlier, an easy accommodation in mid-November, none of the subsequent delays would have been necessary. Therefore, these unnecessary delays must be charged to the Government and not excluded from any computation of the time periods of this case. The delay in trial of the case thus violates the Southern District Plan time limits.

While dismissal is not required for failure to comply with the time limits prescribed by the Southern District Plan, such failure is a factor to be weighed in any analysis of asserted denial of the constitutional right to speedy trial. United States v. Carini, 562 F.2d 144 (2 Cir. 1977). Moreover, irrespective of the violation of Court rules, the delay in this case was "so 'unnecessary'" as to merit dismissal in its own right. Cf. United States v. Lane, 561 F.2d 1075, 1078 (2 Cir. 1977).

The usual evaluation of Sixth Amendment claims to speedy trial is a "balancing test" of four factors: (1) length of delay; (2) reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). None of the factors are talismanic but all are interrelated and must be considered together. United States v. Companion, 545 F.2d 308, 311 (2 Cir. 1976).

In this case the nine-month delay is overshadowed by the wholly unnecessary reason for it and the direct governmental responsibility for the delay of trial. Defendant Sparber repeatedly asserted his right to a speedy resolution of the charges against him. E.g. [36(f) and 36(1)]. Through counsel, he immediately opposed each delay. A stipulation or deposition procedure to avoid the delay occasioned by Mrs. Napoli's trial unavailability was even suggested by counsel for Sparber to afford quick trial [36(f)].

Sparber's assertion of his constitutional right to a speedy trial was at each stage specifically tied to the prejudice he and his family suffered by the delayed resolution of the charges against him. Counsel argued that the delays prejudiced Sparber's continuing attempts to find employment. Further, the delays unnecessarily increased the anxiety of Sparber's family [36(f)].

Here, the wholly unnecessary delay, the direct chargeability of the delay to the Government, and Sparber's steadfast assertion of his right to a speedy trial must lean heavily against the Government. United States v. Vispi, 545 F.2d 328, 335 (2 Cir. 1976). We submit that no substantial showing of prejudice must be made under such circumstances. United States v. Carini, 562 F.2d 144, 151 (2 Cir. 1977).

Sparber's conviction should be reversed and the case remanded with instructions to dismiss the indictment.

2. Nolle Of Lapadura

We submit that Judge Lasker also committed reversible error with respect to the nolle of Lapadura.

First, Judge Lasker erred when he declined to order the Government to produce, as Brady material, the results of the "further investigation" which led the Government to conclude that a prosecution of the indicted co-conspirator, Lapadura, was impossible. We have every reason to believe, as outlined at pages 12-13, 18-19, supra,

that the results of such an investigation would have been of critical importance to the credibility of the Government's principal witness, Jack Napoli. We submit that such material could have been used to substantially impeach Napoli's credibility and thus should have been produced as Brady materials.* Giles v. Maryland, 386 U.S. 66 (1967); United States v. Miller, 411 F.2d 825 (2 Cir. 1969). And we believe it likely that the information exculpatory as to Lapadura would also be exculpatory (and, hence, Brady material) as to the other indicted co-conspirators. Brady v. Maryland, 373 U.S. 83 (1963).

Second, Judge Lasker erred when he allowed Napoli to testify to hearsay declarations of Lapadura, on the theory that Lapadura was an unindicted co-conspirator. The Government had stated in its Bill of Particulars that there were no unindicted co-conspirators, and the nolle of Lapadura precluded any fair characterization of Lapadura as an unindicted co-conspirator -- particularly when the Government had admitted that a prosecution of Lapadura for the conspiracy was not possible.

* We submit, also, that Judge Lasker erred when he refused at trial to allow proof as to the Government's admission with respect to the impossibility of prosecuting Lapadura and when he excluded our offer of proof that the Government nolleed the case against Lapadura because of the Government's conclusion that Napoli's testimony against Lapadura would be incredible if uncorroborated (see p. 18, supra).

3. Subsidization Of Napoli

We submit that Sparber's conviction should also be reversed, and the charges against him dismissed, because of the outrageous manner in which the Government interjected the notorious Napoli into the lives of the defendants and then subsidized him -- by cash payments for "expenses", by payments to him for the jewels he swindled from Jacobs, and by providing him with approximately \$46,000 during the fifteen-month period he was in the Government's much abused "Witness Relocation Program."

Napoli was a paid Government informant even before the present investigation [8, p. 2 n.2]. In January 1976, he was paid \$400 for information relating to Bufalino and Jacobs by the Newark office of the F.B.I. In April 1976 he was paid another \$400 in connection with this case. Although this payment was characterized by Agent Edwards as "expense" money, in fact no accounting was requested or received [Tr. 294-96]. The effect of even these limited payments is obvious; it stimulated Napoli into doing whatever he could to ensnare the defendant.*

* Compare the \$300 contingent fee paid to an informant and condemned as "essentially revolting" in Williamson v. United States, 311 F.2d 441 (5 Cir. 1962).

More outrageous, however, is the manner in which the Government "subsidized" Napoli [Tr. 312], and abetted his thefts, while in the Witness Relocation Program. The Government provided Napoli with false identification papers, monthly subsistence payments in excess of \$1,000, and promises to intercede ("talk" for Napoli) in connection with the many charges pending against him [Tr. 59]. We submit that these extraordinary payments and commitments by the Government, to a trial witness, constitute a fundamental violation of all concepts of "due process". Compare United States v. Russell, 411 U.S. 423 (1963).

Even worse, in our view, is the manner in which the Government conducted itself after it became known that Napoli had used the false identification supplied to him by the Government to plunder the small community of Walnut Creek, California. Napoli's thefts, swindles and various false statements (including misrepresentations as to Government employment which were endorsed by U.S. Marshalls [Tr. 748-50], and the Government's continuation of Napoli in the Program after these events became known to the Government [Tr. 769-70] are shocking in the extreme. It is even more shocking that, as of trial, no federal charges had been leveled against Napoli for his impersonation of Government officers and his false statements to Federally insured banks [Tr. 673-74].

We invite this Court to review this outrageous violation of due process even though not specifically objected to below. United States v. Cuomo, 479 F.2d 688 (2 Cir. 1973).

4. Instructions To The Jury

We submit that Judge Lasker also erred in his instructions to the jury, both as to "extension of credit" and as to expert testimony on the issue of tape alteration.

We have already discussed our contentions with respect to errors in instructions as to "debts" and "extensions of credit" in Section IV(C), supra. In addition to that discussion, we direct the Court's attention to the supplemental jury charge of Judge Newman -- as to extension of credit -- which was endorsed by this Court in United States v. Mase, 556 F.2d 671 (2 Cir. 1977).

In Mase, Judge Newman took pains to make clear that the jury should not convict if it was not persuaded beyond a reasonable doubt that the "transaction gave rise to an existing extension of credit at the time that this

defendant is alleged to have used or participated in the use of extortionate means" and that the statutory definition requires either a loan or an agreement to defer repayment of a debt (556 F.2d at 673-74 n.5). Here, Judge Lasker properly paraphrased the statutory definition [Tr. 995], but then went on to use the term "debt" interchangeably with the phrase "extension of credit" and virtually directed the jury that there was such a "debt or extension of credit in this case" [Tr. 995-96].

We specifically objected to this charge, saying [Tr. 1010-11]:

"As I took notes, your Honor, you seem to be saying, at least at one point, that it was an extension of credit if there was a debt. I think that is incorrect, your Honor."

Our objection was overruled; no correction was made.

We also requested an uncalled witness charge [36(u) No. 7]* and we argued, in summation, that the jury

* We requested that the Court charge:

"If you find that it is within the power of the Government to produce a fact or expert witness who could give material testimony on an issue, you may conclude that the Government's failure to call that witness gives rise to an inference that the testimony of that witness would be unfavorable to the Government."

We submit that the language of such a charge is supported by such well-established authority as Graves v. United States, 150 U.S. 118, 121 (1893).

"CORRECTED PAGE"

should find from the gaps in the tape, and from Napoli's notorious record for falsifications, that the jury should disregard the tapes because of reasonable doubts as to alterations of those tapes [Tr. 893 et seq.]. We argued that we did not have the resources of the United States Government [Tr. 894], we pointed out that the Government had a tape expert in Court that could have been called by the Government on this issue [Tr. 899], and we asked the jury to listen for the judge's charge with respect to uncalled witnesses [Tr. 899-900]. The Government objected, on the grounds that the jury might erroneously believe that indigents had no funds with which to hire experts, and requested an instruction that indigent defendants can be provided with government funds to retain the assistance of experts [Tr. 918-20].

The Court granted the Government's request, instructed the jury that "if a defendant is unable to afford an expert for any kind of a situation in his defense, the Government will make available reasonable funds --I do not want to make it sound unlimited-- reasonable funds for that purpose," and declined to give any charge as to an uncalled witness [Tr. 926].

We respectfully submit that Judge Lasker's instructions to the jury were unfair in the context of our argument with respect to the relatively limited resources of an indigent defendant and we submit that, under the circumstances of this case, the Judge should have given the uncalled witness charge we requested.

V. CONCLUSION

For the reasons urged above, Sparber submits that his conviction should be reversed, the verdict vacated, and the indictment dismissed. In the alternative, Sparber requests that a new trial be granted and that all evidence with respect to the recorded meetings of April 12, 16 and 20 be suppressed.

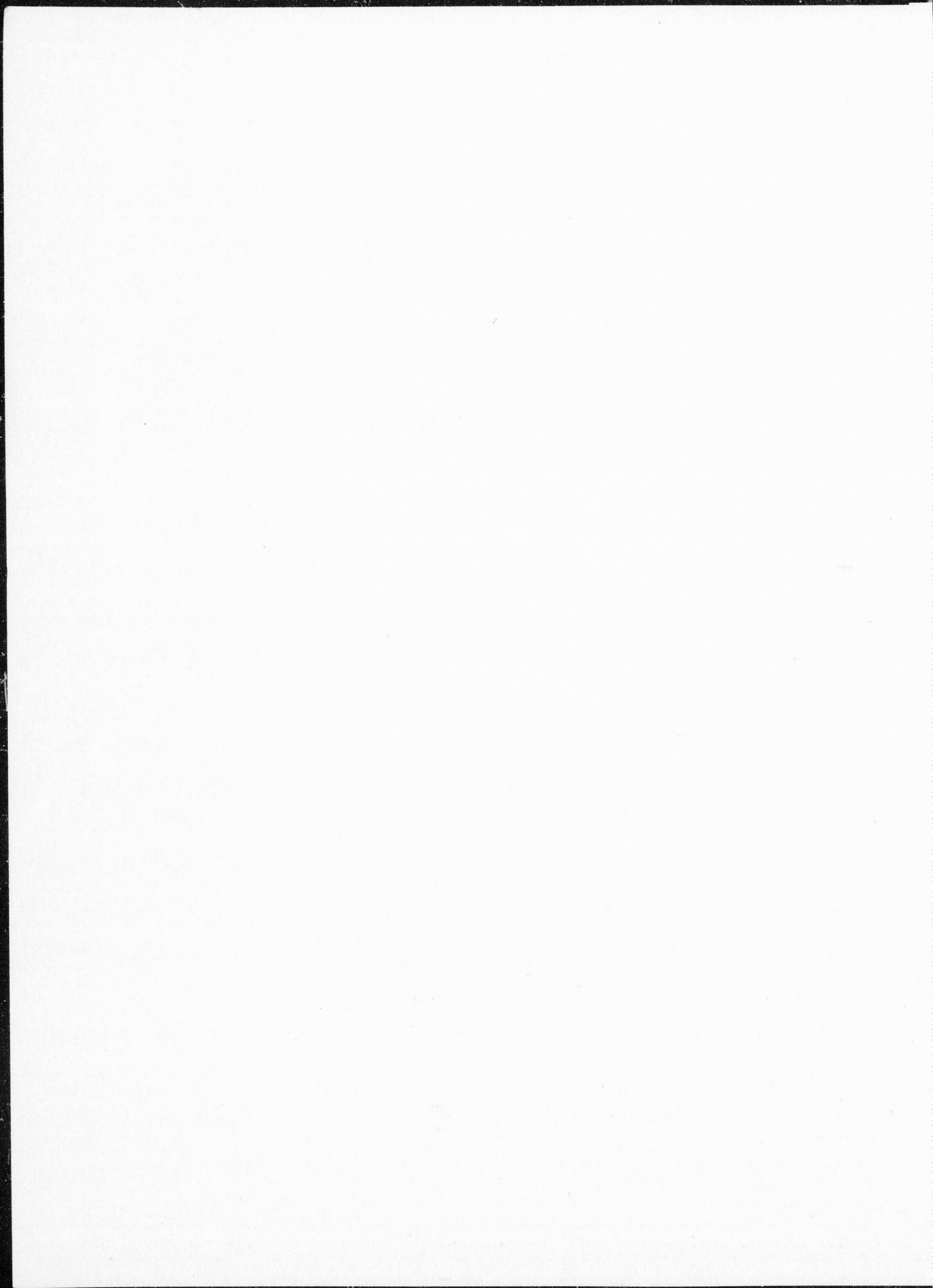
Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA, :
Appellee, :
v. : Docket No. 77-1438
RUSSELL BUFALINO, :
MICHAEL SPARBER and :
HERBERT JACOBS, :
Defendants-Appellants. :
-----x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES F. HALEY, JR., being duly sworn, deposes and
says:

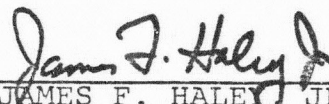
THAT he is not a party to this action, is over 21 years
of age, and resides at 517 East 87th Street, New York, New York
10028; and

THAT on the 23rd day of December 1977 he served copies
of Defendant-Appellant Michael Sparber's Brief and Appendix upon:

BARBARA S. JONES, ESQ.
Assistant United States Attorney
Southern District of New York
One St. Andrew's Plaza - Eighth Floor
New York, New York 10007

be depositing true copies of same, enclosed in a postpaid

wrapper addressed as set forth above, in an official depository for United States mail matter.



JAMES F. HALEY JR.

Subscribed and sworn to
before me this 23rd day
of December, 1977.



Notary Public

Notary Public, State of Texas, Inc.
Notary Public, State of Texas, Inc.
Commission Expires March 30, 1978

RECORDED
DEC 28 1972 JR.
U.S. ATTORNEY
SOUTHERN DIST. OF N.Y.

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